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IN THE

Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST AND PAPER ASSOCIATION INC., AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Air Act, 42 U.S.C. § 7607(b)(1), provides a 60-day period for initiating petitions for review of Environmental Protection Agency (EPA) regulations. Petitions for review filed outside that period are jurisdictionally barred. The District of Columbia Circuit has adopted a "constructive reopening" doctrine that permits a challenge to longstanding regulations regardless of a failure to challenge the regulation within the statutorily authorized period, whenever regulatory changes have "changed the calculus for petitioners in seeking judicial review." Pet. App. 12a. Other courts of appeals have permitted petitions for review in such circumstances only after the petitioner has first filed a petition with the agency to alter or rescind its regulation. The question presented is:

Whether a petitioner may challenge a Clean Air Act regulation after the Act's 60-day time period for judicial review has expired, on the ground that the regulatory context of the regulation has changed sufficiently to alter the stakes for judicial review, without first filing a petition with the EPA to rescind or alter the regulation.

PARTIES TO THE PROCEEDING

The Petitioner in Nos. 02-1135 and 03-1219 below was Sierra Club.

The Petitioners in No. 06-1215 below were Friends of Hudson, Environmental Integrity Project, Louisiana Environmental Action Network and Coalition for a Safe Environment.

The Petitioner in No. 07-1201 below was Coalition for a Safe Environment.

The Respondents in these consolidated cases below were the United States Environmental Protection Agency and Stephen L. Johnson, Administrator.

The Intervenors in these consolidated cases below were American Chemistry Council, National Environmental Development Association's Clean Air Project, Alliance of Automobile Manufacturers, National Paint and Coatings Association, Coalition for Clean Air Implementation, Clean Air Implementation Project, Air Permitting Forum, American Forest and Paper Association, American Petroleum Institute and National Petrochemical & Refiners Association, all in support of Respondent EPA.

RULE 29.6 STATEMENT

Petitioner American Forest & Paper Association ("AF&PA") is the national trade association of the forest, paper and wood products industry.

Petitioner American Petroleum Institute ("API") is a nationwide, not-for-profit association.

National Petrochemical & Refiners Association ("NPRA") is a national trade association.

The AF&PA, API, and NPRA have no parent companies, and no publicly-held company has a 10% or greater ownership interest in either the AF&PA, API, or NPRA.

The American Chemistry Council ("ACC") is a not-for-profit trade association. ACC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a ten percent (10%) or greater ownership interest in ACC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Chemistry Council, American Forest and Paper Association Inc., American Petroleum Institute, and National Petrochemical & Refiners Association respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 551 F.3d 1019 and is reproduced in the appendix to this petition (Pet. App.) at 1a–21a. The orders of the court denying the petitions for rehearing and rehearing en banc are unreported, and are reprinted at Pet. App. 22a–25a.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. A timely petition for rehearing was denied on July 30, 2009. Pet. App. 22a–23a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

Section 112, 42 U.S.C. § 7412, section 302, 42 U.S.C. § 7602, and section 307, 42 U.S.C. § 7607, of the Clean Air Act, and 40 C.F.R. § 63.6, in relevant parts, are reproduced in the appendix at 26a–35a.

STATEMENT

In this case, a divided panel of the D.C. Circuit invalidated a 1994 air pollution rule at the Sierra Club's request, even though the Clean Air Act's 60–day window for seeking judicial review of the rule

had long since passed. The court reasoned that, notwithstanding the text of the Clean Air Act, Sierra Club should be allowed to challenge the 1994 rule because later rulemakings had changed the context in which the earlier adopted rule operates, which has supposedly altered the "stakes of judicial review." The panel held that the rule had been "constructively reopened," while conceding that it had not been "actually reopened."

The holding below raises a square conflict among the circuits: the consensus of the Fifth, Eighth, Ninth, and Eleventh Circuits is that, in these circumstances, Sierra Club should have first presented its case to the agency, petitioning the Environmental Protection Agency (EPA) to rescind its rule. If EPA had denied its petition to rescind, all circuits agree that the Sierra Club could have challenged this denial and the agency's reasoning in federal court. This petition-to-rescind procedure would have caused Sierra Club no harm and would have avoided several harms caused by the D.C. Circuit's ruling.

First, the D.C. Circuit's ruling defies the plain text of the Clean Air Act (CAA). Under CAA section 307(b)(1), Sierra Club had 60 days within which to file its petition for review, 42 U.S.C. § 7607(b)(1); here, it waited eight years.

Second, the decision below unravels the normal procedure for administrative rulemaking. In the normal rulemaking process the agency notifies the public of a proposed rule change; the stakeholders comment on the proposal; the agency compiles these comments in a record; and finally the agency makes a considered decision on the basis of that record. At that point, the decision is subject to judicial review for a specified period of time. The "constructive

reopening" doctrine, which allows a party to challenge a longstanding regulation in court anytime that the context of the regulation changes, bypasses and undercuts this process. It allows a petitioner to raise a new challenge in court, without notice to other stakeholders or comments from them, without a record, without agency consideration of the views of all interested parties, and without a reasoned agency decision made in a nonlitigation context.

Third, the D.C. Circuit severely compounded this problem in its substantive ruling by invalidating the 1994 rule on the basis that EPA had supposedly admitted that it did not comply with statutory requirements. Regardless of whether EPA actually admitted anything, an agency cannot "admit" the meaning of a statute. Allowing an agency to admit to the meaning of a statute means that an agency can reverse a longstanding rule in its litigation papers. In this case, the court held that a few sentences in a legal brief in 2008 negated a rule promulgated 14 years earlier after careful deliberation through notice-and-comment procedures. If the agency wishes to reverse position, it should do so following regular rulemaking procedures open to all stakeholders.

Fourth, invalidating this particular rule threatens regulated industries and businesses with substantial liability, and the economy with unnecessary disruption. The 1994 rule had provided that during startup, shutdown, and malfunction (SSM) events, businesses had to follow good work practices for minimizing emissions, rather than meeting the otherwise applicable standards for emissions of hazardous air pollutants developed for normal operations. EPA promulgated this rule because it recognized that startup, shutdown, and malfunction periods present unique and disparate challenges.

Acknowledging that these idiosyncrasies often make it impossible for businesses to meet the otherwise applicable emission standard, or for EPA to prescribe a different standard for such events, EPA directed that all sources follow "good air pollution control practices for minimizing emissions," during startup, shutdown, and malfunction events. 40 C.F.R. § 63.6(e)(1)(i). The ruling below means businesses will be liable for noncompliance with standards that EPA has acknowledged they will be unable to meet during certain SSM periods. This is a significant threat to these businesses because both the government and ordinary citizens may sue them under the Clean Air Act, potentially subjecting violating businesses to substantial civil, and even criminal, penalties.

In sum, this case presents an issue of sweeping importance both to administrative law and to companies subject to the Clean Air Act—an issue on which the circuits are squarely divided. The Court should grant certiorari.

A. Statutory Background

The Clean Air Act, designed to "protect and enhance the quality of the Nation's air resources," 42 U.S.C. § 7401(b)(1), assumed its modern shape after significant amendments in 1970. It contains several programs to achieve its ends. Among the principal provisions are the Clean Air Act section 111 "standards of performance" for certain categories of new sources that "cause[], or contribute[] significantly to, air pollution" that endangers the public. 42 U.S.C. § 7411(b)(1). These section 111 standards are known as new source performance standards, or NSPS. When EPA first issued NSPS standards in the 1970s, it directed that they did not apply to periods of equipment startup, shutdown, and malfunction

(SSM), because the technologies used to meet these standards of performance often "do not reach optimum operating efficiency for some time," and because there is a "statistical probability of infrequent, unavoidable mechanical failures" that can make it impossible for a source to meet the standards during a period of malfunction. 37 Fed. Reg. 17,214 (proposed Aug. 25, 1972). Instead, sources must follow "good air pollution control practice for minimizing emissions" during SSM periods—a standard that better reflects the unique and unpredictable problems faced by extremely diverse sources during these events. 40 C.F.R. § 60.11(d).

The Clean Air Act also regulates hazardous air pollutants under section 112. 42 U.S.C. § 7412. In 1990 Congress significantly altered the hazardous air pollutant provisions of the Clean Air Act. Congress listed 189 hazardous air pollutants, *id.* § 7412(b), and directed that EPA provide "a list of all categories and subcategories" of stationary sources that emitted these pollutants by November 15, 1991. *Id.* § 7412(c). Congress also instructed EPA to promulgate emission standards for each source category on an aggressive schedule. *Id.* § 7412(d), (e). These section 112 standards are known as maximum achievable control technology, or MACT, standards. MACT standards for new sources must be at least as stringent as "the emission control that is achieved in practice by the best controlled similar source." *Id.* § 7412(d)(3). EPA has set MACT standards on a source-by-source basis for well over one hundred source categories, 40 C.F.R. pt. 63, ranging from "Wood Furniture Manufacturing Operations," 40 C.F.R. pt. 63, subpt. JJ, to "Containers" 40 C.F.R. pt. 63, subpt. PP, and from "Dry Cleaning Facilities," 40 C.F.R. pt. 63, subpt. M, to "Shipbuilding and Ship Repair," 40 C.F.R. pt. 63,

subpt. II. Thus, these section 112 standards now affect a vast array of American manufacturers.

In promulgating MACT standards during the early 1990s, EPA relied upon its experience from the NSPS program. It noted that section 112's technology-based standards for hazardous air pollutants are "essentially equivalent to [section 111] performance standards," which apply to non-hazardous air pollutants. 58 Fed. Reg. 42,760, 42,762 (proposed Aug. 11, 1993). Consequently, it adopted a similar exemption and general duty for startup, shutdown, and malfunction events. EPA stated, with no equivocation, that "it is technically impossible to properly operate" some required pollution control techniques during "unpredicted and reasonably unavoidable failures of air pollution control systems." *Id.* at 42,777. Accordingly, it required sources to comply with the general duty to follow "good air pollution control practices for minimizing emissions to the greatest extent possible consistent with safety and good air pollution control practices," during such events, 40 C.F.R. § 63.6(e)(1)(i), rather than the otherwise applicable MACT standard. National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 59 Fed. Reg. 12,408 (Mar. 16, 1994) ("1994 Rule").

Another provision of the 1994 Rule established "recordkeeping requirements to allow [sources] to develop a plan" for SSM events. 58 Fed. Reg. at 42,777. The 1994 Rule also provided that this plan would be incorporated into the operating permit required by the Clean Air Act, Title V. See 42 U.S.C. § 7661 *et seq.*; 59 Fed. Reg. at 12,439.

EPA's final rule was published on March 16, 1994. Clean Air Act section 307(b) directs that section 112 rules may be challenged only by a petition for review

in the D.C. Circuit within 60 days of publication—in this case the deadline for challenge was May 15, 1994. 42 U.S.C. § 7607(b)(1). Environmental groups did not petition for review of the 1994 Rule. Although industry groups did seek review of other portions of this rule,[1] no one challenged the SSM provision at issue here—that is, the requirement that a source follow the general duty to minimize emissions during SSM periods unless its MACT prescribes a more specific SSM standard. Accordingly, all stakeholders—EPA, industry, States, environmental groups, and others, viewed the SSM issue under section 112 as resolved, subject only to future agency promulgations, after notice and opportunity to comment, of new MACT emission standards for individual source categories.

After 1994, EPA promulgated MACT standards for numerous source categories. Because these standards are specific to individual types of industrial operation, they may supersede the general provisions of the 1994 Rule where applicable. Some of these MACT standards for specific industrial operations apply during SSM periods, superseding the general duty to follow good practices for minimizing emissions during such periods. See 40 C.F.R. pt. 63, subpt. L, National Emission Standards for Coke Oven Batteries; 40 C.F.R. § 63.310. This makes sense for source categories where startup, shutdown, and malfunction events create predictable emission problems that may be planned for and addressed with new technology.

Many of the MACT standards, however, do not apply during SSM events; instead, they rely on the

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[1] Industry groups' claims were largely rejected. *Nat'l Mining Ass'n* v. *U.S. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) (per curiam).

general duty established in the 1994 rule to follow good air pollution control work practices for minimizing emissions at such times. This is not surprising because during startup, shutdown or malfunction, it is often literally impossible for sources to comply with the otherwise applicable MACT standards for normal operations.

For example, when, after the decision below, EPA proposed MACT standards for stationary reciprocating internal combustion engines, EPA recognized that "emissions will likely be different during periods of startup and malfunction, particularly for engines relying on catalytic controls." 74 Fed. Reg. 9698, 9710 (proposed Mar. 5, 2009). The agency determined that for some stationary internal combustion engines, it could not rely upon catalytic controls to reduce emissions during startup "because the engine exhaust temperatures need to increase up to a certain level for such controls to work effectively." *Id.* Further, EPA found that for this category of sources, add-on controls often cannot be relied upon during periods of malfunction, and relying upon the catalytic controls during this period could permanently damage the controls, rendering them unusable during normal conditions. *Id.*

Faced with the decision below, EPA could no longer rely on the general duty, and instead proposed different, less stringent standards for periods of startup, shutdown, and malfunction. *Id.* at 9702–03 (listing different proposed standards for non-emergency 2SLB, 4SLB, 4SRB, and CI sources). But *existing* MACT standards often rely on the same kinds of catalytic controls—controls that EPA has acknowledged cannot be applied during startup and malfunction. Thus, EPA was only stating the obvious years ago when it noted that "unpredicted and

reasonably unavoidable failures of air pollution control systems" could occur, making it "technically impossible" to comply with MACT standards designed for normal operation. 58 Fed. Reg. at 42,777. Indeed, applying MACT standards designed for normal operations to SSM events would violate the plain text of the CAA, which requires that such standards be "achievable." 42 U.S.C. § 7412(d)(2).

B. Proceedings Below

In 2002, 2003, and 2006 EPA promulgated new rules that changed how EPA *monitors* a source's compliance with the general duty to minimize emissions during SSM events.[2] As noted, other provisions of the 1994 Rule required sources to file SSM plans. Under these provisions, compliance with the plan provided a safe harbor from enforcement actions for violating the general duty. The 2002, 2003, and 2006 rulemakings altered these provisions so that plan requirements no longer needed to be subject to Title V review, but also provided that a source's compliance with a plan no longer provided it with a safe harbor.

Sierra Club filed petitions for review, challenging the 2002, 2003, and 2006 rules, alleging that these

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[2] National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j), 67 Fed. Reg. 16,582 (Apr. 5, 2002); National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j), 68 Fed. Reg. 32,586, 32,591 (May 30, 2003); National Emission Standards for Hazardous Air Pollutants: General Provisions, 71 Fed. Reg. 20,446 (Apr. 20, 2006).

rules did not ensure compliance with the general duty. But Sierra Club also argued that the 1994 rule itself was invalid because it relied on the general duty to minimize emissions during SSM periods, rather than the otherwise applicable MACT standard. Sierra Club argued that the 1994 Rule violates section 112's requirement that EPA promulgate "emission standards" because CAA § 302(k) defines "emission standard" as a requirement that "limits the quantity, rate, or concentration of emissions of air pollutants on a *continuous* basis." 42 U.S.C. § 7602(k) (emphasis added). According to Sierra Club, the 1994 rule did not provide for emission limits on a "continuous" basis.

EPA, joined by Petitioners, noted that the court only had jurisdiction to review petitions that had been timely filed, and that the period for reviewing the 1994 Rule had long passed. The D.C. Circuit acknowledged that the petition fell outside the statutory period, and that EPA had neither reopened the 1994 Rule, nor acted in a manner that was "tantamount to an *actual* reopening" of the rule. Pet. App. 8a–9a (emphasis in original). Nevertheless, the court held that EPA had "constructively reopened" its 1994 Rule by "modifying the SSM plan requirements." *Id.* at 10a. The court asserted that changing the SSM plan requirements had "'*completely* changed the regulatory context for its SSM exemption.'" *Id.* (quoting Sierra Club brief) (emphasis in original).

Offering several extended quotations from Sierra Club's brief, and none from the Clean Air Act, the court asserted that "'EPA ha[d] eliminated all of the[] safeguards,'" that had ensured compliance with the general duty. Pet. App. 10a (quoting Sierra Club brief). The court suggested that "'the general duty requirement and the SSM plan requirements were

both elements of a package deal that EPA devised and sold to the public as adequate protection from [hazardous air pollutants] during SSM events.'" *Id.* at 12a (quoting Sierra Club brief). Thus, the court concluded that the 2002, 2003, and 2006 rules had "changed the calculus for petitioners in seeking judicial review, and thereby constructively reopened consideration of the exemption from section 112 emission standards during SSM events." *Id.* at 12a–13a (internal citation omitted).

The court next concluded that the 1994 Rule violated CAA section 112. It reasoned that the definition of "emission standard" in CAA section 302(k) meant that "there must be continuous section 112–compliant standards." Pet. App. 15a. It asserted that EPA had admitted that the general duty to follow good practices to minimize emissions was "not a section 112–compliant standard." *Id.* Thus, it invalidated the 1994 Rule, asserting that "the general duty that applies during SSM events is inconsistent with the plain text of section 112." *Id.* at 2a. Consequently, the court did not reach Sierra Club's objections to the 2002, 2003, and 2006 rules. *Id.* at 17a.

Judge Randolph dissented from the panel decision. On the constructive reopening doctrine, he noted that "[t]he majority's [constructive reopening] rationale implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from third parties." Pet. App. 19a. He also noted that there is no need for the constructive reopening doctrine: Sierra Club "may file a petition to rescind [the 1994] regulations, and if EPA denies the petition, Sierra Club may seek judicial review of EPA's action." *Id.* at 20a. Judge Randolph also dissented from the majority's

substantive ruling, noting that the majority's substantive analysis "dispose[d] of the case with an argument not addressed in the brief of either party," so "EPA never had a fair opportunity to address the issue." *Id.* at 20a–21a. A timely petition for en banc rehearing was denied on a five-to-three vote, with Senior Judge Randolph and Judge Kavanaugh not participating.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's "constructive reopening" device violates the plain text of the Clean Air Act, expanding the jurisdiction of the court of appeals beyond that granted by Congress. The decision also conflicts with the decisions of several other federal circuits. The court's disregard of the text of the Act conflicts with a long line of decisions from this Court. The decision below presents particularly important questions because the "constructive reopening" doctrine threatens to undo administrative finality in cases far beyond those involving EPA, thereby shifting the focus of agency rulemaking from notice and comment procedures, where the agency, industry, other organizations, and the public can present their views and defend their interests, to the federal courts, where litigants are incentivized to play a cat-and-mouse game with the agency and other parties in order to attack settled rules.

The need for review of the decision of the D.C. Circuit is particularly acute because of its substantive conclusion that the general duty to follow "safety and good air pollution control practices for minimizing emissions," during periods of equipment startup, shutdown, and malfunction, unambiguously violates EPA's duty to promulgate "emission standards." This aspect of the decision holds sources

experiencing unavoidable malfunctions liable for failure to comply with MACT rules that were adopted on the understanding that it would often be impossible to comply with them during malfunctions. Given that the CAA authorizes both governmental and citizen suit enforcement of the Act, the decision threatens industries with substantial, unavoidable, and unnecessary liabilities.

I. THE DECISION BELOW DEFIES THE PLAIN TEXT OF THE CLEAN AIR ACT AND UNRAVELS IMPORTANT ADMINISTRATIVE PROCEDURES.

The Clean Air Act's judicial review provision, CAA section 307(b)(1) provides: "A petition for review of action of the Administrator in promulgating . . . any emission standard or requirement under section 7412 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1).[3] It further provides:

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

Id.; see also *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 572–73 (2007).

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[3] This provision dictates the review procedures for eight categories of EPA action under the CAA, as well as "any other nationally applicable regulations promulgated, or final action taken" by EPA under the Act. 42 U.S.C. § 7607(b)(1).

There is no dispute that in this case the Sierra Club's petition is not "based solely on grounds arising after" 1994. Although Sierra Club has asserted that the 2002, 2003, and 2006 rules "*completely* changed the *regulatory context* for [the] SSM exemption," Pet. App 9a (second emphasis added), Sierra Club's challenge is unquestionably aimed at the 1994 exemption itself. Whether or not Sierra Club's petition is based *partly* on grounds arising after 2002, clearly it is not based *solely* on such grounds.

The text of the Clean Air Act provides an unambiguous answer to petitioner's challenge: it is years too late. The decision below, however, discarded the statutory time limits prescribed by Congress. Instead, the court reasoned that EPA's changes to the SSM plan requirements had "significantly altered the stakes of judicial review," and thus concluded that "[t]he fact that the regulatory terms defining the general duty itself are unchanged is legally irrelevant." Pet. App. 11a (internal quotations and alteration omitted).

To support its decision, the court of appeals provided an extremely one-sided summary of the regulatory history of SSM plan requirements. But more importantly, it offered no explanation of why this regulatory history has any relevance to the text of the Clean Air Act, which bars Sierra Club's challenge. Instead, it relied on a handful of earlier D.C. Circuit cases, principally *Kennecott Utah Copper Corp.* v. *United States Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), that have employed the "constructive reopening" device. Pet. App. 9a–11a. Such a text-free approach to statutory construction conflicts with this Court's long-standing and consistent doctrine: "Where the language is plain and admits of no more than one meaning, the duty of

interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

One might imagine that such a departure from the statutory text was motivated by strong policy concerns, but there is no practical advantage to the constructive reopening device. A long-standing rule is not completely shielded from review by the running of the statutory time period for a petition. As Judge Randolph explained, "Sierra Club has another option: it may file a petition to rescind those regulations and, if EPA denies the petition, Sierra Club may seek judicial review of EPA's action." Pet. App. 20a.

While this procedure would cause Sierra Club almost no trouble, it would provide EPA, the public, and the reviewing court clear benefits. Faced with a petition to rescind, EPA could address the validity of its 1994 regulation in a non-litigation setting and within the context of its overall responsibilities under section 112. Equally important, other stakeholders, such as the States, industry, and other non-governmental organizations, could present their views and defend their interests. And, if EPA decided to rescind its regulation, it would have to do so through notice-and-comment rulemaking. *See Motor Vehicles Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983). This procedure would allow the agency to make an informed decision based on the comments of all stakeholders. Finally, it would create a record that would serve as the basis for the court of appeals' review of the agency's action.

Furthermore, as Judge Randolph noted, the constructive reopening doctrine "implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from

third parties." Pet. App. 19a. And, of course, the doctrine is not limited to Clean Air Act regulation. Kennecott was a case challenging regulations issued under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* 88 F.3d 1191. In almost every area of administrative law, each new regulation changes the "regulatory context" for numerous other regulations. Thus, the statutory time limits for review contained in the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, as well as other specific judicial review statutes similar to CAA section 307(b)(1), are in danger of being compromised by this ruling. Here, for example, the decision radically altered the regulatory context for current MACT standards for section 112 source categories that rely on the general duty. Before the ruling below, the otherwise applicable MACT standard did not apply during SSM events; now, under the panel's ruling, it will. There is no doubt that the decision below "'significantly alter[ed] the stakes of judicial review'" of these source-specific MACT standards. Pet. App. 11a. Under the decision below, each such standard may now be challenged regardless of the Clean Air Act's explicit deadline.

This unravels the regular ordering of the administrative process. It unfairly disadvantages those parties that rely on the notice-and-comment procedure of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* And, it rewards parties that ambush agencies in litigation before they have been able to consider their regulation in a non-litigation context. EPA's proposed MACT standard for stationary reciprocating internal combustion engines, which followed the circuit court's decision in this case, reaffirms the wisdom of allowing the agency to develop its record in a non-litigation context. For this

category of sources, the agency has been able to seek views on how long a "start up" period should be and consider the fact that use of the catalytic controls during malfunction could render them ineffective during normal operations. 74 Fed. Reg. at 9710–11. Such tailoring of the MACT standards to the applicable physical conditions has not been possible for the large number of source categories for which the decision below made the established MACT standard applicable at all times regardless of particular problems and safety considerations present during SSM events. This approach does not foster the reasoned decision-making promoted by established administrative procedures. Instead, it pushes administrative disputes into the federal courts.

II. THE CONSTRUCTIVE REOPENING DOCTRINE CREATES A CIRCUIT SPLIT.

Given that the constructive reopening doctrine violates the plain text of the Clean Air Act and the animating principles of administrative procedure, it is not surprising that it conflicts with the decisions of several circuit courts of appeals. The D.C. Circuit, of course, handles many petitions for review, so its decision, even standing alone, would warrant this Court's review because of the practical importance of its holding. But other circuits have repeatedly rejected the approach taken by the D.C. Circuit, holding that if a party wants to challenge a regulation after statutory time limits have passed, it must first petition the agency to rescind the challenged regulation.

The Fifth, Ninth, and Eleventh Circuits have emphasized that the petition-to-rescind procedure is faithful to the text of statutory time limitations, while at the same time allowing for review of older regulations that are alleged to be *ultra vires*. In

Dunn-McCampbell Royalty Interest, Inc. v. *National Park Service*, 112 F.3d 1283 (5th Cir. 1997), the Fifth Circuit addressed a 1994 challenge to 1978 National Park Service regulations. *Id.* at 1285–86. The court held that the challenge was barred by the general six-year statute of limitations for civil actions against the government, 28 U.S.C. § 2401(a). *Dunn-McCampbell*, 112 F.3d at 1286–88. It noted: "If Dunn-McCampbell were able to point to . . . an application of the regulations [to Dunn-McCampbell] here, or if they had petitioned the National Park Service to change the . . . regulations and been denied, this court might have jurisdiction to hear that case." *Id.* at 1287–88.

The Fifth Circuit relied on a Ninth Circuit decision and a 1990 decision of the D.C. Circuit:

> The Ninth Circuit, for example, has held that a challenger may contest an agency decision as exceeding constitutional or statutory authority after the limitations period, but only by petitioning the agency to review the application of the regulation to that particular challenger. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir.1991). Although the *Wind River* Court never said so explicitly, the court treated the agency's denial of that petition as a "final agency action" sufficient to create a new cause of action under the APA.
>
> Similarly, in *Public Citizen v. Nuclear Regulatory Commission*, the D.C. Circuit held that it had jurisdiction to hear a substantive challenge after the limitations period had run. 901 F.2d 147, 152 (D.C.Cir.[1990]). In that case, the claimant filed a petition with the agency to rescind regulations, then challenged the agency's denial of the petition in federal court.

Id. at 1287 (subsequent history citation omitted).

The *Wind River* decision is similarly instructive. In 1987, the Wind River mining company petitioned the Bureau of Land Management (BLM) to rescind its 1979 decision to classify certain land as a Wilderness Study Area. *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 711–12 (9th Cir. 1991). The company alleged that the land did not meet the statutory requirements for this classification. *Id.* at 711. When BLM refused, the company filed suit in federal court. *Id.* at 712. Although the Ninth Circuit concluded that 28 U.S.C. § 2401(a)'s six-year requirement applied to the company's claim, *id.* at 713, it held that the claim was timely because of the 1987 petition to rescind. *Id.* at 716. It concluded that if "a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger," reasoning that "[t]he government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs." *Id.* at 715.

The Eleventh Circuit has also held that a litigant may challenge the substantive validity of an older regulation through the petition-to-rescind procedure. See *Legal Envtl. Assistance Found., Inc.* v. *U.S. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) ("[I]n the course of reviewing EPA's order denying LEAF's petition, over which our jurisdiction is not questioned, we also have jurisdiction to entertain LEAF's contention that the regulations upon which EPA relies are contrary to statute and therefore invalid, regardless of the fact that LEAF's challenge is brought outside the

statutory period for a direct challenge to the regulations.") (interpreting the Safe Drinking Water Act's judicial review provision, 42 U.S.C. § 300j-7(a)(2)).

Other circuits have reached the same conclusion, on the basis that requiring an initial petition to rescind allows for creation of a record and a considered decision by the agency made outside of the litigation context. The Eighth Circuit and even the D.C. Circuit followed this reasoning in relatively early Clean Air Act cases. The courts were interpreting section 307(b)(1) of the 1970 Clean Air Act, which provided: "A petition for review .... shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day." 42 U.S.C. § 1857h–5(b)(1) (current version at 42 U.S.C. § 7607(b)(1)). The Eighth Circuit concluded that if a petitioner wanted to bring a challenge outside of the thirty day limit, it must first present the request to the agency, even if the petition was based on new grounds. *Union Elec. Co.* v. *EPA*, 515 F.2d 206, 220 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976). Relying on legislative history, and the need to develop a record at the agency before an appeal, the court reasoned:

> The Senate Report indicates that it is only when the Administrator fails to act upon the basis of the new information that review is proper under § 307, implying that the information would have to be brought to the Administrator's attention. The petition for review in this circumstance would be a challenge to the Administrator's action and would require a scrutiny of the administrative record available to the Administrator to determine whether a clear error of

> judgment had been shown. It would not require that this court in the first instance develop a record on the challenges.

Id. at 220. Thus, the court concluded that "[i]t is only when the Administrator fails to act upon the basis of the new information presented to him that a petition for review is proper." *Id.*

In *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975), the D.C. Circuit adopted the Eighth Circuit's approach, stating:

> we find no substantive difference between direct review of a new information challenge and review of the Administrator's refusal to revise a standard when presented with new information. In both cases a revision would be ordered only if it would be arbitrary and capricious to do otherwise. We think, however, that review of the Administrator's refusal is a considerably more desirable approach. Such a procedure would avoid litigation when the Administrator acceded to a request and, when he did not, it would present us with an administrative record, including the Administrator's views in a nonlitigation context, a judicially recognized distinction of importance.

Id. at 666. Ordinarily, the Court is not concerned when there appears to be an intra-circuit conflict and thus the presence of an earlier D.C. Circuit ruling would not be relevant to certiorari. But given the dominance of the D.C. Circuit in reviewing agency rulemakings, tension among decisions within that Circuit should operate much the way it does when the Court is reviewing decisions of the Federal Circuit on subjects over which it has all but exclusive authority. Thus, Judge Randolph's dissent, which relies heavily

upon previous Circuit holdings, provides an unusually strong basis for this Court's review in this case.

The Fifth Circuit has also endorsed these principles in the context of the Clean Water Act in *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282 (5th Cir. 1977). The court embraced *Oljato*, noting that the petition-to-rescind procedure would "ensure orderly development of the issues and the record, as well as . . . promote the full and objective application of the agency's expertise." *Id.* at 1289.

Thus, other courts of appeals have reached agreement on the proper procedure for substantive challenges to agency regulations outside the statutorily prescribed review period: such challenges must be brought through a petition to rescind. Such a rule honors the statutory text, and the principles of administrative law. The decision below is an egregious departure from the decisions of the other circuits, and even from earlier decisions of the D.C. Circuit. And it is an extremely important departure because of the D.C. Circuit's special role in reviewing agency regulations. Accordingly, this Court should grant the petition.

III. THE PRACTICAL IMPACT OF THE DECISION BELOW MAKES IT PARTICULARLY WORTHY OF REVIEW.

The substantive conclusion of the court below reinforces the need for review. The court of appeals provided little independent reasoning for invalidating the 1994 Rule. Instead, it relied on a supposed agency admission that the general duty to follow "good air pollution control practices for minimizing emissions," 40 C.F.R. § 63.6(e)(1)(i), is "not a section 112–compliant standard." Pet. App. 15a. This

reasoning aggravates the court's mistaken reopening decision, because it means that EPA may reverse a well-settled rule without any administrative process or notice to interested parties. According to the court, EPA's appellate brief as respondent below suddenly reversed a position that the agency had adopted in notice-and-comment rulemaking and then maintained for 14 years. This reasoning is inconsistent with this Court's holdings on rescinding a regulation, see *Motor Vehicles Mfrs.*, 463 U.S. at 42–43, and with the distinction this Court has drawn between agency interpretations promulgated under delegated congressional authority and those asserted in litigation papers. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

The decision reached by this faulty reasoning threatens to overturn EPA's complex and well-developed NSPS program, which was established well over 30 years ago. As noted, the general SSM duty for section 112 is modeled on the NSPS standard under section 111. Although NSPS standards are known as "standards of performance" rather than "emission standards," the Clean Air Act defines a "standard of performance" as an "emission limitation," 42 U.S.C. § 7411(a)(1), which is defined as equivalent to an "emission standard." *Id.* § 7602(k). Thus, NSPS standards are now vulnerable to a similar challenge.

This decision also presents the unusual case of practical consequences so stark that they warrant review. The decision holds sources experiencing unavoidable malfunctions liable for failing to comply with MACT rules that were promulgated on the understanding that they would not apply during

startups, shutdowns, or malfunctions.[4] As noted, MACT standards are set so that they are at least as stringent as "the emission control that is achieved in practice by the best controlled similar source." *Id.* § 7412(d)(3). And when EPA set these standards, it generally did not consider the emission control achieved in practice by sources during SSM events, because those events were covered by the general duty to minimize emissions at such times. See 74 Fed. Reg. at 9710. Indeed, EPA still has not even collected *data* on these emissions. *Id.* But under the decision below, a source that is starting up, shutting down, or has malfunctioned will be held to the emission standards achieved by the best sources during *normal operation*, even though "it is technically impossible to properly operate" many required pollution control technologies during "unpredicted and reasonably unavoidable failures of air pollution control systems." 58 Fed. Reg. at 42,777; 74 Fed. Reg. at 9710–11.

If the D.C. Circuit's decision is implemented, the government could prosecute sources that unavoidably fail to comply with MACT limits. And even if it does not, Clean Air Act section 304 provides for citizen suits. 42 U.S.C. § 7604. Thus, any party seeking to punish an emission source for any reason, environmental or otherwise, or simply seeking attorneys fees, see *id.* § 7604(d), can sue these sources and claim a violation of section 112 that was never contemplated when the 1994 Rule was adopted. Given the CAA's

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[4] As EPA has recognized, it can take 15 to 30 minutes of operation for exhaust gas temperatures to reach the temperature levels where certain catalytic controls become effective, and attempting to use these controls during startup or malfunction could compromise their overall effectiveness. 74 Fed. Reg. at 9710.

penalties, which include civil and criminal sanctions, *id.* § 7413(b); 40 C.F.R. § 19.4; 42 U.S.C. § 7413(c)(1), this decision threatens industry with substantial, unavoidable liability and irreparable harm.

Thus, the decision below presents a particularly important question of federal law because of its implications for administrative procedure, the Clean Air Act, and the national economy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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October 22, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

Nos. 02-1135, 03-1219, 06-1215, 07-1201

SIERRA CLUB,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY and STEPHEN L. JOHNSON, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Respondents

AMERICAN CHEMISTRY COUNCIL, *et al.*,
Intervenors

Argued Sept. 12, 2008
Decided Dec. 19, 2008

Before ROGERS, TATEL, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* ROGERS.

Dissenting opinion by *Senior Circuit Judge* RANDOLPH.

ROGERS, *Circuit Judge*:

Petitioners challenge the final rules promulgated by the Environmental Protection Agency exempting major sources of air pollution from normal emission standards during periods of startups, shutdowns, and

malfunctions ("SSM") and imposing alternative, and arguably less onerous requirements in their place.[1] Because the general duty that applies during SSM events is inconsistent with the plain text of section 112 of the Clean Air Act ("CAA"), even accepting that "continuous" for purposes of the definition of "emission standards" under CAA section 302(k) does not mean unchanging, the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously. Accordingly, we grant the petitions and vacate the SSM exemption.

I.

CAA section 112 designates over one hundred pollutants as "hazardous," 42 U.S.C. § 7412(b)(1), and directs the Administrator of EPA to list all categories of "major sources" of hazardous air pollutants ("HAPs"), *id.* § 7412(c)(1), and to establish for each "emissions standards" requiring "the maximum degree of reduction in emissions," *id.* § 7412(d)(2). These controls are referred to as maximum achievable control technology ("MACT") standards. *See Natural Resources Def. Council v. EPA*, 489 F.3d 1364, 1368 (D.C.Cir.2007). Section 112 also sets a "MACT floor," *id.*, requiring that standards "shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source," 42 U.S.C. § 7412(d)(3). After eight years, under section 112(f), EPA is to revisit and potentially revise the emissions standards for each source category to ensure that they "provide an ample margin of safety to protect public health," *id.* § 7412(f)(2)(A). "Emission standard" is defined in section 302(k) as "a requirement established by the State or the Administrator

[1] 40 C.F.R. § 63.6(e)(*1*)(i), (f)(1), and (h)(1).

which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." 42 U.S.C. § 7602(k).

In addition to revising section 112, the 1990 Amendments also added Title V, which establishes a permit program to better monitor compliance with emissions standards. "Each permit . . . shall include enforceable emission limitations and standards, a schedule of compliance, . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter." *Id.* § 7661c(a). Sources are required to certify that they are in compliance with the applicable requirements of the permit "and to promptly report any deviations from permit requirements to the permitting authority." *Id.* § 7661b(b)(2). Title V further creates a "permit shield" for sources, ensuring that compliance with the permit is "deemed compliance with other applicable provisions" of the CAA. *Id.* § 7661c(f). "Any permit application, compliance plan, permit, and monitoring or compliance report" under Title V must be "ma[d]e available to the public." *Id.* § 7661a(b)(8).

In the 1970s EPA had determined that excess emissions during SSM periods are not considered violations of CAA emissions standards under section 111.[2] Although sources were "exempt[ed] from com-

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[2] *Standards of Performance for New Stationary Sources*, 42 Fed.Reg. 57,125 (Nov. 1, 1977); *see, e.g.*, 51 Fed.Reg. 27,956, 27,970 (Aug. 4, 1986). Section 111 left to the Administrator's discretion the establishment of emissions standards for pollutants from sources while section 112 mandated the establish-

pliance with numerical emissions limits" during SSM events, 42 Fed.Reg. 57,125, EPA required that "[a]t all times, including periods of [SSM], owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions," 40 C.F.R. § 60.11(d). EPA refers to sources' obligation to minimize emissions to the greatest extent possible as the "general duty" standard. *See, e.g.*, 70 Fed.Reg. 43,992, 43,993 (July 29, 2005).

In 1994, EPA adopted the SSM exemption for section 112. *National Emission Standards for [HAPs] for Source Categories: General Provisions*, 59 Fed.Reg. 12,408 (Mar. 16, 1994) ("1994 Rule").[3] Each source was thus exempted from the numerical limits set for emission control pursuant to section 112 and only the general duty would apply. However, in order to avoid a blanket exemption, EPA required each source to develop and implement an SSM plan. "The purpose of the plan [was] for the source to demonstrate how it will do its reasonable best to maintain compliance with the standards, even during [SSMs]." *Id.* at 12,423. Each SSM plan was to "describe[ ], in detail, procedures for operating and maintaining the source during periods of [SSM] and a program of corrective action for malfunctioning process and air pollution control equipment used to comply with the relevant stan-

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ment of emissions standards for over 100 HAPs. *See New Jersey v. EPA*, 517 F.3d 574, 580 n. 1 (D.C.Cir.2008).

[3] "The General Provisions have the legal force and effect of standards, and they may be enforced independently of relevant standards." 59 Fed.Reg. at 12,408. The requirements of the General Provisions are superceded by any category-specific standard. *See id.* at 12,409.

dard." *Id.* at 12,439. The EPA Administrator could require changes to the SSM plan if it was inadequate. *Id.* at 12,440. The plan was incorporated by reference into the source's Title V permit, 59 Fed.Reg. at 12,439, and thereby subject to prior approval by the State permitting authority, 58 Fed.Reg. 42,760, 42,768 (Aug. 11, 1993). Under the CAA, the SSM plan was to be made publicly available, 42 U.S.C. § 7661a(b)(8), and served as a safe harbor during SSM events, *id.* § 7661c(f).

In 2002, EPA removed the requirement that a source's Title V permit incorporate the SSM plan, and instead determined that a source's Title V permit must simply require the source to adopt an SSM plan and to abide by it.[4] Because the SSM plan was no longer itself part of the permit and could be revised without formal revision of the permit, it was no longer subject to prior approval, and was no longer eligible for the permit shield. *Id.* Additionally, "to minimize the unnecessary production of the SSM plan," 66 Fed.Reg. 16,318, 16,326 (Mar. 23, 2001), the SSM plan was to be made publicly available only upon request. *Id.* The Sierra Club sought reconsideration and filed a petition for review of the 2002 Rule, and as part of a settlement agreement, EPA proposed "modest" changes to the SSM plan regulations, 67 Fed.Reg. 72,875, 72,879 (Dec. 9, 2002), namely that sources must submit their SSM plans to the permitting authority along with their Title V permit applications.

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[4] *National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j)*, 67 Fed.Reg. 16,582 (Apr. 5, 2002) ("2002 Rule").

In the final rule adopted in 2003, however, EPA "decided instead to adopt a less burdensome approach,"[5] requiring members of the public to make a "specific and reasonable request" of the permitting authority to request the SSM plan from the source. 68 Fed.Reg. at 32,591. The Sierra Club challenged the 2003 Rule in a new petition for review, which was consolidated with its previous challenge. The Natural Resources Defense Council ("NRDC") also filed a petition for reconsideration on the ground that any limitation on the public availability of the SSM plans was unlawful. EPA agreed to take comment on the new SSM provisions, and the consolidated cases were held in abeyance pending reconsideration.

In 2006, EPA retracted the requirement that sources implement their SSM plans during SSM periods.[6] According to EPA, "[t]his is consistent with the concept that the plan specifics are not applicable requirements [under Title V] and thus cannot be required to be followed. Nonetheless, the general duty to minimize emissions remains intact and is the applicable requirement." 70 Fed.Reg. 43,992, 43,994 (Jul. 29, 2005). Post-event reporting requirements provided that sources must describe what actions were taken to minimize emissions "any time there is an exceedance of an emission limit . . . and thus a possibility that the general duty requirement was violated." 71 Fed.Reg.

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[5] *National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j)*, 68 Fed.Reg. 32,586, 32,591 (May 30, 2003) ("2003 Rule").

[6] *National Emission Standards for Hazardous Air Pollutants: General Provisions*, 71 Fed.Reg. 20,446, 20,447 (Apr. 20, 2006) ("2006 Rule").

at 20,448. EPA clarified that reporting and record-keeping is only required when a start up or shut down caused the applicable emission standard to be exceeded, and "for any occurrence of malfunction which also includes potential exceedances." *Id.* at 20,447. EPA also eliminated the requirement that the Administrator obtain a copy of a source's SSM plan upon request from a member of the public and determined that the public may only access those SSM plans obtained by a permitting authority. The permitting authorities, in turn, "still have the discretion to obtain plans requested by the public, but will not be required to do so." *Id.*

Petitioners[7] now contend that the exemption from compliance with emissions standards during SSM events is both unlawful and arbitrary, and that the 2002, 2003, and 2006 rules unlawfully and arbitrarily fail to "assure compliance" with "applicable requirements" under Title V. Upon determining that we have jurisdiction, we turn to petitioners' challenges to the rules.

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[7] The Coalition for a Safe Environment ("CFASE") petitioned for reconsideration of EPA's conclusion that a source's "Title V permit will assure its compliance with the general duty to minimize emissions during [SSM] events merely by requiring the facility to file a report *after* such an event." CFASE, Comment Letter, Petition for Reconsideration of "National Emission Standards for Hazardous Air Pollutants: General Provisions," 71 Fed.Reg. 20,446 (June 19, 2006). EPA denied reconsideration, 72 Fed.Reg. 19,385 (Apr. 18, 2007), and CFASE petitioned for review. This petition along with the other challenges to the 2006 Rule were consolidated with the previous petitions for review.

II.

The CAA provides that "[a]ny petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." 42 U.S.C. § 7607(b)(1). EPA maintains that petitioners have waived their challenge to the SSM exemption by not challenging the 1994 Rule articulating that the general duty standard replaces section 112 emissions standards during SSM events. Petitioners, noting that "EPA received repeated comments on the illegality of its SSM exemption in the course of its rulemaking—which covered more than six years, generated three separate proposals and necessitated three petitions for reconsideration," Petrs. Br. 29, respond that "rulemakings that significantly change the context for a regulatory provision can re-open it for comment, even if an agency does not change the provision itself," *id.*, and that this is what happened here.

Under the reopening doctrine, the time for seeking review starts anew where the agency reopens an issue "by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the regulation in its final form." *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C.Cir.1989); *see P & V Enters. v. U.S. Army Corps of Eng'rs.*, 516 F.3d 1021, 1023-24 (D.C.Cir.2008); *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C.Cir.1988). In its 2003 rulemaking, EPA discussed revisions to its SSM plan requirements, but asserted that "[n]othing in these revisions is intended . . . to change the general principle that compliance with a MACT standard is not mandatory during periods of [SSM]." 67 Fed.Reg. at 72,880. In response to Sierra Club's comments questioning the legality of the SSM

exemption, EPA stated: "We believe that we have discretion to make reasonable distinctions concerning those particular activities to which the emission limitations in a MACT standard apply, and we, therefore, disagree with the legal position taken by the Sierra Club." 2003 Rule, 68 Fed.Reg. at 32,590. However, "when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review. Nor does an agency reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter." *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1213 (D.C.Cir.1996); *see also Am. Iron*, 886 F.2d at 398. Moreover, when EPA received unsolicited comments on this issue in its 2006 rulemaking, it explained that "[t]hese commenters raise issues that are outside of the scope of this rulemaking. The general duty provision has been in place since 1994." 71 Fed.Reg. at 20,449; *cf. PanAmSat Corp. v. FCC*, 198 F.3d 890, 897 (D.C.Cir.1999). Such agency conduct is not tantamount to an *actual* reopening.

However, petitioners contend that the 2006 Rule "has *completely* changed the regulatory context for its SSM exemption by stripping out virtually all of the SSM plan requirements that it created to contain that exemption." Petrs. Br. at 29. In *Kennecott*, this court established that an "agency's decision to adhere to the *status quo ante* under changed circumstances" can "constructively reopen[ ]" a rule "by the change in the regulatory context." 88 F.3d at 1214. A constructive reopening occurs if the revision of accompanying regulations "significantly alters the stakes of judicial review," *id.* at 1227, as the result of a change that

"could have not been reasonably anticipated," *Envtl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C.Cir.2006).

Petitioners recount, and EPA does not dispute, that:

> To avoid creating a "blanket exemption from emission limits," EPA's 1994 rule required that (1) sources comply with their SSM plans during periods of SSM; (2) SSM plans be reviewed and approved by permitting authorities like any other applicable requirement; (3) SSM plans be unconditionally available to the public, which could participate in evaluating their adequacy in the permit approval process; and (4) SSM plan provisions be directly enforceable requirements. 59 Fed.Reg. at 12423[ ]. In the rulemakings challenged here, however, EPA has eliminated all of these safeguards. SSM plans are no longer enforceable requirements, and EPA has expressly retracted the requirement that sources comply with them. 71 Fed.Reg. at 20447[ ]. EPA also has eliminated any requirement that SSM plans be vetted for adequacy and any opportunity for citizens to see or object to them. *Id.*[ ].

Petrs. Br. at 29-30. These are not mere "minor changes," *Envtl. Def.*, 467 F.3d at 1333. In so modifying the SSM plan requirements, EPA has constructively reopened the SSM exemption. While the text of the general duty itself did not change, "EPA has *completely* changed the regulatory context for its SSM exemption by stripping out virtually all of the SSM plan requirements that it created to contain the exemption." Petrs. Br. at 29 (emphasis in original).

EPA's modifications to the SSM plan requirements created a different regulatory construct as to the means of measuring compliance with the general duty.

Because the general duty does not include any "numerical emissions limits," 42 Fed.Reg. at 57,125, the general duty assumes new shape depending on the means used to capture that standard. In 1994, EPA determined that compliance with the general duty on its own was insufficient to prevent the SSM exemption from becoming a "blanket" exemption. It established the SSM plan requirements precisely because the general duty was inadequate. Now EPA has removed these necessary safeguards. Because the general duty was defined in 1994 through and housed in the four walls of the SSM plan requirements, EPA's modifications to those requirements have eliminated the only effective constraints that EPA originally placed on the SSM exemption. The fact that the regulatory terms defining "the general duty" itself are unchanged is legally irrelevant because the other "extensive changes . . . significantly alter[ed] the stakes of judicial review," *Kennecott*, 88 F.3d at 1226-27. Just as the court in *Kennecott* agreed with industry that the agency had constructively reopened a regulation when it incorporated amended regulations that expanded available remedies and thus altered its financial incentives for challenging the regulation, so too here from the perspective of environmental petitioners' interests and allocation of resources the general duty "may not have been worth challenging in [1994], but the [revised] regulations gave [that duty] a new significance," *id.* at 1227. In *Kennecott*, there were "new and potentially more onerous provisions," *id.*, facing industry; here petitioners face a blanket exemption and a more onerous task in effecting compliance with HAP emission standards during SSM events.

Although EPA asserts that "the duty to minimize emissions is not inextricably linked to the SSM plan," Resp. Br. at 24, the rulemaking record shows that

"the general duty requirement and the SSM plan requirements were both elements of a package deal that EPA devised and sold to the public as adequate protection from [HAPs] during SSM events," Petrs. Reply Br. at 12. When commenters raised objections to the SSM exemption in 1994, EPA's direct response relied upon the SSM plan as a justification for the relaxed standard:

> "The EPA believes, as it did at proposal, that the requirement for a[n] [SSM] plan is a reasonable bridge between the difficulty associated with determining compliance with an emission standard during these events and a blanket exemption from emission limits. The purpose of the plan is for the source to demonstrate how it will do its reasonable best to maintain compliance with standards, even during [SSMs]."

59 Fed.Reg. at 12,423. EPA attempts now to dismiss this statement as mere "inartful[ ] word[ing]," Resp. Br. at 27, but the fact that EPA's entire discussion of the proper standard to apply during SSM events invoked the SSM plan provisions confirms that the SSM plan and general duty standard are inextricably linked. Indeed, the explicit purpose of the SSM plan as devised in 1994 was to "ensure" that facility owners abide by the general duty. 59 Fed.Reg. at 12,439.

Shifting from a regulatory scheme based on a mandatory SSM plan that was part of a source's Title V permit, which is subject to prior approval with public involvement, *see* 42 U.S.C. § 7661a(b)(6), to a regulatory scheme with a non-mandatory plan providing for no such approval or involvement but only after-the-fact reporting changed the calculus for petitioners in seeking judicial review, *id.*, and thereby constructively reopened consideration of the exemption from section

112 emission standards during SSM events. Petitioners' challenges to the SSM exemption are therefore timely.

III.

On the merits, petitioners contend that EPA's decision to exempt major sources from compliance with section 112 emissions standards during SSM events is contrary to the plain text of the statute and arbitrary and capricious in any event. EPA and Industry Intervenor respond that EPA's general-duty requirement during SSM events is a lawful interpretation of the statute and a reasonable way to reconcile the need to minimize emissions with the inherent technological limitations during SSM events. Challenges to EPA's interpretation of the CAA are governed by *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), in which "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Only if the statute is silent or ambiguous on a particular issue, may the court defer to the agency's reasonable interpretation. *Id.* at 844, 104 S.Ct. 2778. The CAA provides that the court may reverse any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A).

Section 112(d) provides that "[e]missions standards" promulgated thereunder must require MACT standards. 42 U.S.C. § 7412(d)(2). Section 302(k) defines "emission standard" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction,

and any design, equipment, work practice or operational standard promulgated under this chapter." *Id.* § 7602(k). Petitioners contend that, contrary to the plain text of this definition, "EPA's SSM exemption automatically excuses sources from compliance with emission standards whenever they start up, shut down, or malfunction, and thus allows sources to comply with emission standards on a basis that is not 'continuous.'" Petrs. Br. at 23. EPA responds that the general duty that applies during SSM events "along with the limitations that apply during normal operating conditions, together form an uninterrupted, *i.e.*, continuous, limitation because there is no period of time during which one or the other standard does not apply," Respt.'s Br. at 31. "Although *Chevron* step one analysis begins with the statute's text," the court must examine the meaning of certain words or phrases in context and also "exhaust the traditional tools of statutory construction, including examining the statute's legislative history to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 267 (D.C.Cir. 2001) (citations and quotation marks omitted).

EPA suggests that the general duty is "part of the operation and maintenance requirements with which all sources subject to a section 112(d) standard must comply," Respt.'s Br. at 33, pointing to section 302(k)'s statement that an "emission standard" includes "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction," 42 U.S.C. § 7602(k). Section 302(k)'s inclusion of this broad phrase in the definition of "emission standard" suggests that emissions reduction requirements "assure continuous emission reduction" without necessarily continuously applying a single standard. Indeed,

this reading is supported by the legislative history of section 302(k):

> By defining the terms "emission limitation," "emission standard," and "standard of performance," the committee has made clear that constant or continuous means of reducing emissions must be used to meet these requirements. By the same token, intermittent or supplemental controls or other temporary, periodic, or limited systems of control would not be permitted as a final means of compliance.

H.R. Rep. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170. "Congress's primary purpose behind requiring regulation on a continuous basis" appears, as one circuit has suggested, to have been "to exclude intermittent control technologies from the definition of emission limitations," *Kamp v. Hernandez*, 752 F.2d 1444, 1452 (9th Cir.1985).

When sections 112 and 302(k) are read together, then, Congress has required that there must be continuous section 112-compliant standards. The general duty is not a section 112-compliant standard. Admitting as much, EPA states in its brief that the general duty is neither "a separate and independent standard under CAA section 112(d)," nor "a free-standing emission limitation that must independently be in compliance" with section 112(d), nor an alternate standard under section 112(h). Respt.'s Br. 32-34. Because the general duty is the only standard that applies during SSM events—and accordingly no section 112 standard governs these events—the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously. EPA has not purported to act under section 112(h), providing that a standard may be relaxed "if it is not feasible in the judgment of

the Administrator to prescribe or enforce an emission standard for control of a [HAP]," *id.* § 7412(h)(1), based on either a (1) design or (2) source specific basis, *id.* § 7412(h)(2)(A), (B).

EPA's suggestion that it has "discretion to make reasonable distinctions concerning those particular activities to which the emission limitations in a MACT standard apply," 68 Fed.Reg. at 32,590, belies the text, history and structure of section 112. "In 1990, concerned about the slow pace of EPA's regulation of HAPs, Congress altered section 112 by eliminating much of EPA's discretion in the process." *New Jersey*, 517 F.3d at 578. In requiring that sources regulated under section 112 meet the strictest standards, Congress gave no indication that it intended the application of MACT standards to vary based on different time periods. To the contrary, Congress specifically permitted the Administrator to "distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards," CAA § 112(d)(1), 42 U.S.C. § 7412(d)(1). Additionally, while recognizing that in some instances it might not be feasible to prescribe or enforce an emission standard under § 112, Congress provided in section 112(h) for establishment of "work practice" or "operational" standards instead, but, as petitioners point out, "strictly limited this exception by defining 'not feasible . . .' to include only [two types of] situations," Petrs. Br. 9, and did not authorize the Administrator to relax emission standards on a temporal basis. *See NRDC*, 489 F.3d at 1374.

In sum, petitioners' challenge to the exemption of major sources from normal emission standards during SSM is premised on a rejection of EPA's claim of retained discretion in the face of the plain text of sec-

tion 112. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *NRDC*, 489 F.3d at 1374 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001)). The 1990 Amendments confined the Administrator's discretion, *see New Jersey*, 517 F.3d at 578, and Congress was explicit when and under what circumstances it wished to allow for such discretion, *id.* at 582. "EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *New Jersey*, 517 F.3d at 583 (quoting *Whitman*, 531 U.S. at 485, 121 S.Ct. 903).

Accordingly, we grant the petitions without reaching petitioners' other contentions, and we vacate the SSM exemption. *See New Jersey*, 517 F.3d at 583 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C.Cir.1993)).

RANDOLPH, *Senior Circuit Judge*, dissenting.

I do not agree that we have jurisdiction over Sierra Club's petition for judicial review. The original regulations at issue, 40 C.F.R. § 63.6(e)-(h) (1994), exempt periods of startup, shutdown, and malfunction from opacity and non-opacity emission standards. When EPA promulgated these regulations in 1994, Sierra Club took no legal action. Yet under the Clean Air Act a petition for judicial review of an EPA regulation must be filed within 60 days of the regulation's publication in the Federal Register. 42 U.S.C. § 7607(b)(1).

Of course an agency may give notice and ask for comment on whether an existing regulation should be modified or repealed or retained, or it may indicate in response to comments that it has reconsidered the regulation. *See Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C.Cir.1996). Or an agency may give its regulation new significance by altering other regulations incorporating it by reference. *See id.* at 1226-27. In any one of these situations the 60-day period would begin to run again. But nothing of the sort occurred here. According to Sierra Club, EPA's rulemakings in 2002, 2003, and 2006 rendered enforcement of the 1994 startup, shutdown, and malfunction regulations more difficult. Petr.'s Br. at 29. Even if true,[1] that could hardly have amounted

[1] The majority opinion makes a factual error when it suggests that the new startup, shutdown, and malfunction regulations have eliminated a prior requirement that EPA approve startup, shutdown, and malfunction plans in the course of its review of Title V permits. Maj. Op. at 1026. In fact, the plans were merely incorporated by reference into Title V permits; there has never been any requirement that EPA review or approve the plans before approving permits. *See* 66 Fed.Reg. 16,318, 16,326 (2001); *see also* 40 C.F.R. § 63.6(e)(3)(viii) (1998); 67 Fed.Reg. 16,582, 16,587 (2002).

to agency "action" re-promulgating the 1994 regulations, which is what § 7607(b)(1) requires as a prerequisite for judicial review. After all, Sierra Club's complaint is not that the 1994 regulations are now hard to enforce; it is instead that the 1994 regulations are invalid and always have been. The recent rules did not alter the exemption for startup, shutdown, and malfunction events. The new rules simply modified requirements for each source's plan regarding implementation of the duty to minimize pollution during the exempt periods. Sierra Club had the option—which it exercised[2]—of challenging the new rules on the ground that the modifications will lead to unacceptable levels of pollution.

In *Kennecott*, regulated industries sought judicial review of an allegedly invalid regulation after changes in related regulations made its enforcement *more* likely and more punitive. Sierra Club has no comparable financial incentives capable of assessment by a court; instead, it presumably has an incentive to challenge any regulatory change that might lead to increased pollution. The majority's rationale implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from third parties. Such a regime, and the instability it generates, is intolerable. Perhaps that is why, until today, we have limited the constructive reopening doctrine to cases involving regulated entities. *See Envtl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C.Cir.2006).

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[2] The majority opinion does not reach Sierra Club's argument that the recent rules fail to guarantee enforcement of applicable emissions standards and therefore violate Title V of the Clean Air Act.

Although EPA did not reopen its 1994 regulations for judicial review, Sierra Club has another option: it may file a petition to rescind those regulations and, if EPA denies the petition, Sierra Club may seek judicial review of EPA's action. *See, e.g., Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir.1990). There is no basis for permitting Sierra Club to circumvent that procedural requirement in this case. *See Kennecott*, 88 F.3d at 1214.

There is another problem with the majority opinion. It disposes of the case with an argument not addressed in the brief of either party—namely, that § 112(h) of the Clean Air Act provides the only basis for EPA to impose a non-numerical emissions standard and that the 1994 regulations are unlawful because they do not comply with the requirements of § 112(h). Sierra Club mentions § 112(h), *see* Petr.'s Br. at 24, but its argument that the 1994 regulations are unlawful rests on § 302(k)'s requirement that "emission standards" must regulate air pollutants on a "continuous basis," *id.* at 23-24. EPA refers to § 112(h) only to state that it is irrelevant to the question whether its "general duty to minimize" is an enforceable standard satisfying the statutory requirement to regulate sources on a continuous basis. Resp.'s Br. at 33 n. 5. As we have recognized, a passing mention of an otherwise unbriefed issue does not normally suffice to preserve the issue. *United States v. Haldeman*, 559 F.2d 31, 78 n. 113 (D.C.Cir.1976).[3]

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[3] The majority attempts to shoehorn its holding into Sierra Club's "continuous basis" arguments, stating that it reads § 112 and § 302(k) together to "require[ ] that there must be continuous section 112-compliant standards." Maj. Op. at 1027. But the discussion of § 302(k)'s "continuous basis" requirement does no work in the majority's legal analysis; without the "continuous

Though there have been exceptions, we have generally declined to consider issues not briefed by the parties, especially when the issue is not easy or the record is long and complex, *cf. United States v. Pryce*, 938 F.2d 1343, 1347-48, 1351 (D.C.Cir.1991), when doing so would be unfair to the respondent, *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 n. 32 (D.C.Cir.1981), or when the legal issue is particularly important, *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983). Here, the question whether EPA's interpretation of § 112 is permissible is a difficult one, and both the record and the statute are complex. Here too, EPA has never had a fair opportunity to address the issue.

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basis" requirement, the majority would still hold that EPA's standards must be "section 112-compliant." The majority's point is not that EPA has failed to regulate emissions sources on a continuous basis. *See* Maj. Op. at 1027 (stating that EPA need not continuously apply a uniform standard). It is instead that the 1994 rule's "general duty to minimize" does not meet the requirements of § 112(h). Maj. Op. at 1027-28.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed July 30, 2009]

No. 02-1135
September Term 2008
EPA-67FR16582

SIERRA CLUB,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY and
LISA PEREZ JACKSON, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Respondents

AMERICAN CHEMISTRY COUNCIL, *et al.*,
Intervenors

Consolidated with 03-1219, 06-1215, 07-1201

BEFORE: ROGERS and TATEL, *Circuit Judges*, and RANDOLPH*, *Senior Circuit Judge*

ORDER

Upon consideration of the petition of intervenor American Chemistry Council, et al. for panel rehearing filed on April 3, 2009, and the response thereto, it is

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*Senior Circuit Judge Randolph would grant the petition.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed July 30, 2009]

No. 02-1135
September Term 2008
EPA-67FR16582

SIERRA CLUB,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY and
LISA PEREZ JACKSON, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Respondents

AMERICAN CHEMISTRY COUNCIL, *et al.*,
Intervenors

Consolidated with 03-1219, 06-1215, 07-1201

BEFORE: SENTELLE,* *Chief Judge*, and GINSBURG, HENDERSON,* ROGERS, TATEL, GARLAND, BROWN,* GRIFFITH, and KAVANAUGH,** *Circuit Judges*

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* Chief Judge Sentelle and Circuit Judges Henderson and Brown would grant the petitions.

** Circuit Judge Kavanaugh did not participate in this matter.

ORDER

The petitions of intervenors National Environmental Development Association's Clean Air Regulatory Project and American Chemistry Council, et al. for rehearing en banc and the responses thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX D

STATUTES AND REGULATIONS

42 U.S.C. § 7412. Hazardous air pollutants

* * * *

(d) Emission standards

(1) In general

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods

Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures,

processes, methods, systems or techniques including, but not limited to, measures which—

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources

The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or

subcategory but shall not be less stringent, and may be more stringent than—

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold

With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources

With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the

authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision

The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved

No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate—

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new

and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate—

(i) the use of sodium silicate (or equivalent) luting compounds, if the Administrator determines that use of sodium silicate is an effective means of emissions control and is achievable, taking into account costs and reasonable commercial warranties for doors and related equipment; and

(ii) door and jam cleaning practices.

Notwithstanding subsection (i) of this section, the compliance date for such work practice regulations for coke oven batteries shall be not later than the date 3 years after November 15, 1990.

(C) For coke oven batteries electing to qualify for an extension of the compliance date for standards promulgated under subsection (f) of this section in accordance with subsection (i)(8) of this section, the emission standards under this subsection for coke oven batteries shall require that coke oven batteries not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries seeking an extension shall be not later than the date 3 years after November 15, 1990.

(9) Sources licensed by the Nuclear Regulatory Commission

No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act [42 U.S.C. § 2011 *et seq.*] for such category or subcategory provides an ample margin of safety to protect the public health. Nothing in this subsection shall preclude or deny the right of any State or political subdivision thereof to adopt or

enforce any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date

Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

* * * *

42 U.S.C. § 7602. Definitions

When used in this chapter—

* * * *

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.[1]

* * * *

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this

[1] So in original.

title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,[2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator

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[2] So in original.

finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * * *

40 C.F.R. § 63.6. Compliance with standards and maintenance requirements.

* * * *

(e) Operation and maintenance requirements.

(1)(i) At all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with

safety and good air pollution control practices for minimizing emissions. During a period of startup, shutdown, or malfunction, this general duty to minimize emissions requires that the owner or operator reduce emissions from the affected source to the greatest extent which is consistent with safety and good air pollution control practices. The general duty to minimize emissions during a period of startup, shutdown, or malfunction does not require the owner or operator to achieve emission levels that would be required by the applicable standard at other times if this is not consistent with safety and good air pollution control practices, nor does it require the owner or operator to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures (including the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section), review of operation and maintenance records, and inspection of the source.

* * * *